No. 78-1687

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALAN J. WHITE, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-9a) is reported at 589 F. 2d 713. The order of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1978. A petition for rehearing was denied on January 26, 1979 (Pet. App. 1a). On April 19, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to May 21, 1979. The petition was filed on May 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, in the circumstances of this case, petitioner's claim that five evaluations of his fitness for appointment as an Administrative Law Judge should have been removed from his application record was prematurely raised in this suit under the Privacy Act of 1974, where the claim could have been adjudicated in an action challenging the final agency decision rating him ineligible for appointment to such a position.

2. Whether petitioner's constitutional challenge to 5 U.S.C. 552a(k)(5), a provision of the Privacy Act of 1974 that permits limited withholding of materials compiled for determining an applicant's suitability for federal civilian employment, was also prematurely raised.

STATEMENT

1. Petitioner, an attorney employed by the Federal Energy Regulatory Commission (formerly the Federal Power Commission), applied in January 1975 for a rating as an individual eligible for appointment as an Administrative Law Judge (ALJ) at a GS-16 grade level (A. 199). An eligible rating entitles the recipient to consideration by executive agencies in their selection of Administrative Law Judges. On June 6, 1975, petitioner was advised by the Civil Service Commission (since superseded by respondent Office of Personnel Management) that he was rated ineligible for the position. An appeal of that rating was denied on May 24, 1976 (A. 51,335).[1] In the meantime, in January 1976, petitioner applied for a rating of eligibility for appointment as an Administrative Law Judge at a GS-15 grade level (A. 194, 332). On August 13,

[1] "A" refers to the appendix filed in the court of appeals.

1976, petitioner was informed that he had been rated ineligible for the position at this level as well (*ibid.*). An appeal of that rating was denied on April 14, 1978 (Pet. 6, 12). While the second appeal was pending, petitioner initiated an extensive correspondence with Commission officials concerning the contents of his application record, culminating in the instant action (A. 284-326).

In the course of processing both applications, the Commission had distributed inquiries to persons believed to be familiar with petitioner's background and qualifications (A. 194, 332). Following the August 1976 ineligibility determination, petitioner filed two requests under the Privacy Act of 1974, 5 U.S.C. 552a, seeking to have his application record amended through the removal of five evaluations (also known as "vouchers") respecting his professional qualifications. In petitioner's view, those evaluations did not fairly assess his abilities and character. The first request, dated September 27, 1976, specified two evaluations (A. 140); it was denied by the Director of the Commission's Office of Administrative Law Judges on October 12, 1976 (A. 142). On October 18, petitioner appealed this ruling to the appropriate Commission officer, who upheld it on November 12 (A. 143-145, 166-167). Four days after taking that appeal, petitioner filed a second Privacy Act request, asking that five evaluations (including the two specified in the first request) be removed from his file (A. 146-165). This request was denied on December 2, 1976, and an appeal from the ruling was denied on December 22 (A. 169-174).[2]

[2] In the December 2 denial letter, the Director of the Commission's ALJ office noted that petitioner's application had been reexamined in light of the extensive rebuttal he had written to one of the evaluations, and even with "minimal weight" assigned to that evaluation, petitioner still did not attain a rating making him eligible for appointment as an Administrative Law Judge (A. 170).

Of the five evaluations in question, two had been submitted on a confidential basis before the Privacy Act went into effect (A. 103) and two post-Act evaluations were submitted by persons who had expressly requested that their responses be kept in confidence (A. 146). Petitioner was given copies of these four evaluations, with certain portions deleted, and he received a copy of the fifth in its entirety (Pet. App. 5a n.1).

2. On February 11, 1977, while his appeal of the August 1976 ineligibility determination was pending before the Commission's Appeals Review Board, petitioner commenced this action under the Privacy Act of 1974 in the United States District Court for the District of Columbia (A. 5-11). Named as defendants were the Civil Service Commission and the two Commission officers who had denied his requests and appeals seeking removal of the evaluations. In his complaint, petitioner requested that the five evaluations be removed from his application record, that the Commission promptly reconsider, on the basis of the amended record, its August 1976 ineligibility determination, and that the court supervise the reconsideration process. Petitioner also sought $25,000 in damages for alleged willful violations of the Privacy Act, attorneys' fees, and costs (A. 10-11).

Respondents moved for summary judgment on the ground that subjective evaluations of an individual's qualifications for a particular position were not amenable to correction under the Privacy Act simply because that individual disagreed with them, so long as they were clearly labeled as the views of the evaluator. The district court agreed, holding that "the records in issue are not the sort of records which are subject to amendment under the provisions of the Privacy Act of 1974 * * *" (Pet. App. 10a). Accordingly, it granted respondents' motion for summary judgment (Pet. App. 11a).

3. The court of appeals affirmed, but on other grounds. It observed that, at oral argument, petitioner — an attorney who was representing himself — conceded that he had brought this Privacy Act suit in order to amend his application record so as to increase his chances of overturning the Commission's adverse eligibility determination (Pet. App. 8a n.4). The court held that, in these circumstances, petitioner's Privacy Act claims were premature and that the appropriate vehicle in which to pursue his grievance was a suit challenging final agency action with respect to petitioner's application for appointment as an Administrative Law Judge (*id.* at 8a-9a & n.4). Granting petitioner the essential relief sought in his Privacy Act suit, the court stated, would "tend to undermine the established and proven method by which individuals, distressed by agency treatment of their employment applications, have obtained review from the courts" (*id.* at 8a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or of any other circuit. Moreover, the court of appeals' holding is narrow and closely tied to circumstances unique to this case. Further review is therefore not warranted.

1. Petitioner contended in his complaint that five evaluations concerning his character and professional qualifications that had been solicited from individuals by the Civil Service Commission in connection with his application for an eligibility rating entitling him to be considered for appointment as an Administrative Law Judge were defective and that the Commission's refusal to remove them from his application record denied him fair consideration for such a rating. Petitioner sought review of these claims under the Privacy Act of 1974.

Although petitioner also sought damages for respondents' alleged violations of the Act, he represented to the court of appeals at oral argument that he had filed suit simply to modify his application record and thereby enhance his chances of overturning the Commission's adverse decision on his application—a decision that was not final at the time he instituted this action.

If petitioner had not sued under the Privacy Act, but instead had asserted that the agency's alleged error in declining to remove the offending evaluations constituted a violation of his rights under the Due Process Clause, he would not have been permitted to seek judicial review of his claim prior to and apart from the review of the merits of the final agency action on his application for the eligibility rating. See *Barnes* v. *Chatterton*, 515 F. 2d 916 (3d Cir. 1975). See also *Frey* v. *Commodity Exchange Authority*, 547 F. 2d 46 (7th Cir. 1976). The court of appeals, relying on petitioner's representation regarding the gravamen of his suit, did not err in holding that, although petitioner clearly had independent rights under the Privacy Act, permitting him to litigate those rights in an action separate from a challenge to the final agency action on his application "would tend to undermine the established and proven method by which individuals, distressed by agency treatment of their employment applications, have obtained review from the courts" (Pet. App. 8a). Indeed, that petitioner's suit essentially was an attempt to short-circuit the normal review process is made evident by the request in his complaint that the district court order respondents to reconsider his eligibility rating application on the "corrected" record and that the court "supervise" the reconsideration process (A. 11).

The holding of the court of appeals is narrow. The court did not announce a blanket rule requiring that all Privacy Act lawsuits brought to amend the record in an ongoing administrative proceeding must await the final outcome of the proceeding. Neither did the court purport to determine the scope of petitioner's rights under the Privacy Act or any regulations issued thereunder.[1] It noted that petitioner's claims, as he characterized them, could be raised in a suit under the Administrative Procedure Act (5 U.S.C. 706) challenging the Commission's ultimate refusal to certify petitioner as qualified for appointment as an Administrative Law Judge. The court emphasized that its holding "does not in any way seek to jeopardize rights under the Privacy Act to which [petitioner] may ultimately be entitled" (Pet. App. 9a).

Contrary to petitioner's contention (Pet. 39), he has suffered no real harm as a result of the court of appeals' decision; the relief he seeks is, for all practical purposes, still available to him. As he concedes (*ibid.*), an action for damages under the Privacy Act, based on a claim accruing on April 14, 1978, when the Commission issued its final adverse decision regarding his eligibility for appointment (see 5 U.S.C. 552a(g)(1)(C)-(D) and (g)(4)), is not barred by the Act's two-year statute of limitations (5 U.S.C. 552a(g)(5)). Furthermore, petitioner is not precluded from challenging "the record itself for the purpose of changing it" (Pet. 39). He surely is free to allege, in an action challenging the ineligibility determination, that the five evaluations in his application record do

[1]The court held that the evaluations were "records" under 5 U.S.C. 552a(a)(4) (Pet. App. 6a-7a), but this was an issue undisputed by the parties. The court expressly reserved ruling on respondents' defense that these records are not subject to amendment in the manner sought by petitioner (*id.* at 7a-8a).

not accurately reflect his present abilities and should not have been considered by the Commission in determining his eligibility for appointment as an Administrative Law Judge.

Petitioner also contends (Pet. 29-30) that respondents violated the Privacy Act requirement that all requests for amendment of records under the Act be acknowledged in writing within 10 days of receipt (5 U.S.C. 552a(d)(2)(A)) when they failed to give timely written acknowledgement of his second request. But this claim became moot on December 2, 1976, when the request was denied in a letter mailed to petitioner. Again, however, petitioner may litigate that and other alleged violations of the Act's procedural requirements (see Pet. 29-36) in support of his claim for damages.[4]

Finally, there is no merit to petitioner's suggestion (Pet. 44-47) that the decision of the court of appeals conflicts with *Churchwell* v. *United States*, 545 F. 2d 59 (8th Cir. 1976), and with decisions of this Court holding that "the

[4]We note in addition that had petitioner sought to litigate his Privacy Act claims in conjunction with a prompt challenge under the Administrative Procedure Act to the Commission's ineligibility determination, none of those claims would have been barred by the statute of limitations, even though the agency process was delayed in part by this litigation (A. 331). The Commission's obligations with respect to the processing of petitioner's Privacy Act request initially arose after September 27, 1976, when petitioner filed his first request. Thus, on April 14, 1978, when the final decision on petitioner's eligibility for appointment was issued, the limitations period still had nearly six months to run on all claims respecting actions taken on petitioner's request. Indeed, petitioner's Privacy Act claims based on the refusals to amend his application record by deleting the five evaluations in question were not time-barred even when the court of appeals issued its decision in this case, on December 11, 1978, since the final denial of the amendment request occurred on December 22, 1976 (see page 3, *supra*).

party who brings a suit is master to decide what law he will rely upon" (*The Fair* v. *Kohler Die Co.*, 228 U.S. 22, 25 (1913)). In none of the cited cases had the plaintiff conceded that his claim was the equivalent of one that, under an established statutory scheme of judicial review, had to be brought in conjunction with a challenge to a particular kind of final agency action. In any event, the court of appeals held only that, given petitioner's characterization of his cause of action, he should bring his Privacy Act claims in conjunction with a challenge to the final agency action on his application for appointment as an Administrative Law Judge, not that he should have been compelled to choose between those claims and his rights under other sections of the Administrative Procedure Act.[5]

2. Petitioner also challenges the constitutionality of 5 U.S.C. 552a(k)(5), which permits a limited withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment" to protect the interests of sources who request that their identity be kept confidential. This contention is likewise tied to his basic attack on the fairness of the process by which the Commission determined that he was ineligible to be considered for appointment as an Administrative Law Judge. He may still raise that issue both in support of a damages claim

[5]Petitioner is also incorrect in contending that the government's position in *Churchwell* necessarily conflicts with respondents' position in the present case. The government did suggest in *Churchwell* that the Privacy Act might be the appropriate remedy there; but plaintiff's basic claim — the one treated by the court of appeals as the gravamen of her complaint — related not to her right to reconsideration for continued government employment but rather to disclosure by the government of adverse information that stigmatized her in the eyes of prospective employers elsewhere. The petition in the present case presents no such disclosure issue.

under the Privacy Act and as a due process claim in a suit challenging the determination itself. For the reasons discussed above (pages 5-7, *supra*) and because, as petitioner concedes (Pet. 73), neither court below considered the constitutionality of this provision, either on its face or as applied, this question is not appropriate for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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